

22
No. 755.

Office - Supreme Court, U. S.

FILED

MAR 28 1944

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1943.

C. E. MOTTAZ, I. C. SMITH, VIRGINIA BEHNKEN,
WILLIAM H. MORGENS, AND CONTINENTAL
COMPANY, A CORPORATION,
PETITIONERS,

VS.

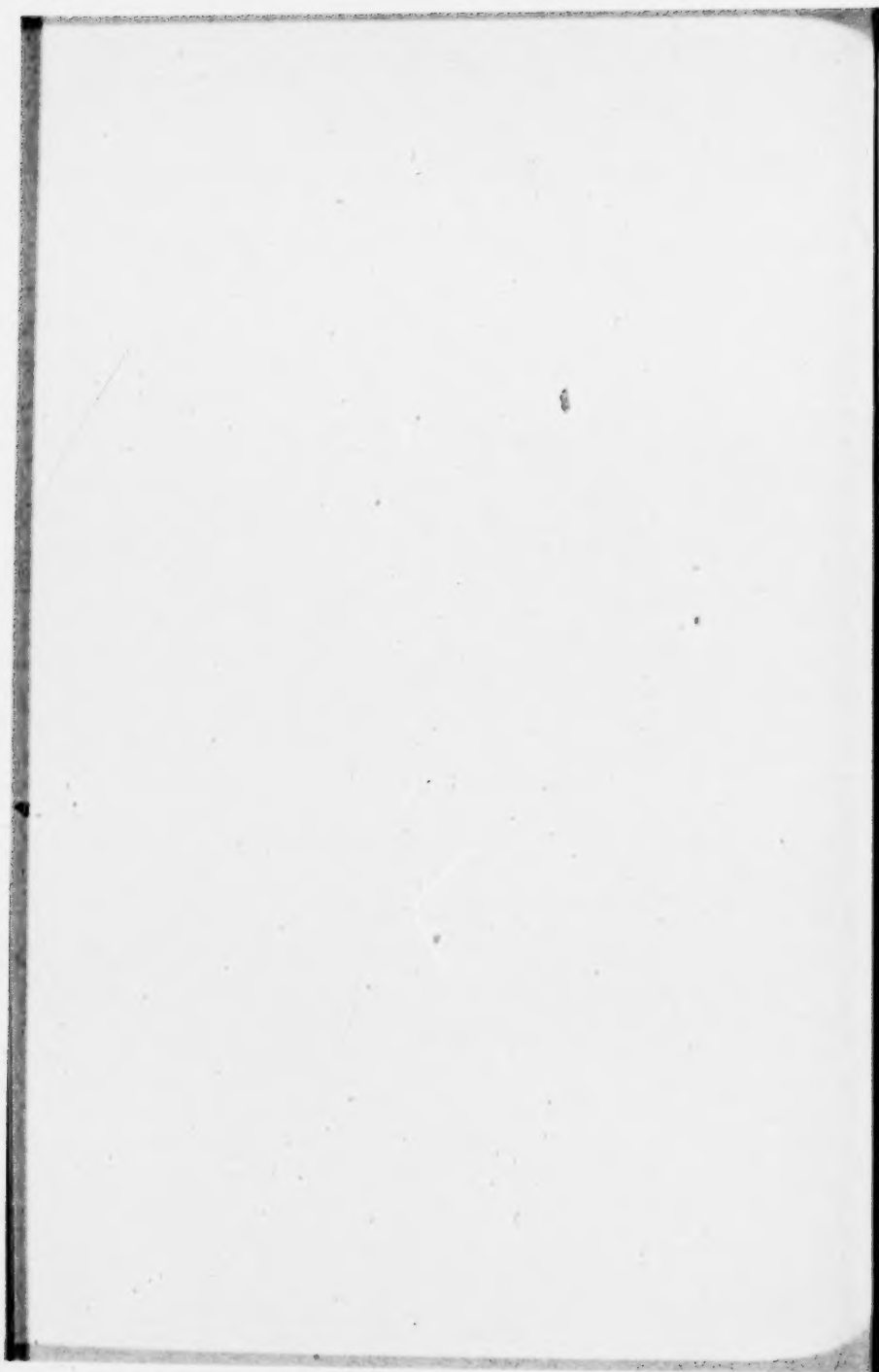
EDWARD L. SCHEUFLE, SUPERINTENDENT OF THE
INSURANCE DEPARTMENT OF THE STATE OF MIS-
SOURI, GUSTAVE J. CRECELIUS, ANNA M. CRECE-
LIUS AND MYRTLE K. CRECELIUS AND KANSAS CITY
LIFE INSURANCE COMPANY, A CORPORATION,
RESPONDENTS.

RESPONDENT SCHEUFLE'S BRIEF OPPOSING ISSUING OF A WRIT OF CERTIORARI.

PRESTON ESTEP,

*Attorney for Respondent, Ed-
ward L. Scheufler, Superin-
tendent of Insurance.*

STANLEY BASSETT,
JOS. R. STEWART,
Kansas City, Missouri,
Of Counsel.



INDEX

Statement	1
Inaccuracies in Petition for Writ	11
Petitioners' Specifications of Error	15
Petition Should Be Dismissed	16
Summary of Argument	19
Argument	21
Conclusion	35
Appendix	37

TABLE OF CASES

Adams vs. Russell, 229 U. S. 353, 57 L. Ed. 1224	17
Biedstein vs. Feltz, 156 S. W. 2d 29, 1. c. 31 (Mo. App.)	17
Brinkerhoff-Faris Trust & Sav. Co. vs. Hill, 281 U. S. 673	25, 31
Broad River Power Co. vs. State of South Carolina, 281 U. S. 537, 74 L. Ed. 1023	14, 17, 18, 22, 27
Chicago, etc., R. Co. vs. Maucher, 248 U. S. 359, 63 L. Ed. 294	17
Cox vs. Texas, 202 U. S. 446, 50 L. Ed. 1099	17
Enterprise Irrigation Dist. vs. Farmers Mut. Canal Co., 243 U. S. 157	23
First Nat'l Bk. of Garnett vs. Ayers, 160 U. S. 660, 40 L. Ed. 573	14, 18, 28
Fox River Paper Co. vs. Railroad Comm., 274 U. S. 651	22, 28
Godchaux Co. vs. Estopinal, 259 U. S. 179, 64 L. Ed. 213	17, 32
Great Northern Railroad Co. vs. Sunburst, 287 U. S. 358	24
Hartford Life Ins. Co. vs. Blincoe, 255 U. S. 129, 65 L. Ed. 549	14, 18, 28

Honeyman vs. Hanan, 300 U. S. 14, 81 L. Ed. 476	17, 31
Hopkins vs. Cofoid, 103 Ill. App. 167	17
International Shoe Co. vs. Pinkus, 278 U. S. 261, 73 L. Ed. 318	13, 21
In re Salmon & Salmon, 143 Fed. 395	13, 21
In re Supreme Lodge of Masons Annuity, 286 Fed. 180	19
In re Weedman Stave Co., 199 Fed. 948	13, 21
In the Matter of the Commonwealth of Virginia, 100 U. S. 313	21
Lawrence vs. State Tax Commission, 286 U. S. 276	24
Lynch vs. People of State of New York, 293 U. S. 52, 79 L. Ed. 191 (Head Note 3)	17, 27
McMillen vs. Ferrum Mining Co., 197 U. S. 343, 49 L. Ed. 784	14, 17, 32
Mutual Life Ins. Co. vs. McGrew, 188 U. S. 291, 308, 47 L. Ed. 480, 484	25
Neblett vs. Carpenter, 305 U. S. 297, 83 L. Ed. 182	14, 17, 28, 34
Norris vs. Alabama, 294 U. S. 587	21
Relfe vs. Rundle, 103 U. S. 222, 26 L. Ed. 337	27
Richardson Machinery Co. vs. Scott, 276 U. S. 128, 72 L. Ed. 497	17, 27
Shee vs. Shee, 319 Mo. 542, 4 S. W. 2d 760, 1. c. 761	16
State ex rel. vs. Hall, 330 Mo. 1107, 52 S. W. 2d 174	16, 26, 34
Supreme Lodge, etc., vs. Meyer, 265 U. S. 30, 68 L. Ed. 885	34
Susquehanna Boom Co. vs. West Branch Boom Co., 110 U. S. 57, 28 L. Ed. 69	14, 17
U. S. vs. Bethlehem Steel Corp., 315 U. S. 289	21
U. S. vs. Butterworth Corp., 269 U. S. 504	21
Valley vs. Northern Fire & Marine Ins. Co., 254 U. S. 348, 65 L. Ed. 297	19
Ward vs. Love Co., 253 U. S. 17	23

INDEX

III

STATUTES

Sec. 6052, R. S. Mo., 1939	16
Sec. 6064, R. S. Mo., 1939	16, 29
Sec. 6065, R. S. Mo., 1939	16
U. S. C. A., Title 28, Sec. 344 (b)	17, 30
Rules of the Supreme Court, Rule 38, Sec. 5 (a)	17, 30, 31
National Bankruptcy Act, Sec. 4 (b)	18
34 C. J., Sec. 794, p. 502, Note 12B	16



No. 755.

Supreme Court of the United States

OCTOBER TERM, 1943.

C. E. MOTTAZ, I. C. SMITH, VIRGINIA BEHNKEN,
WILLIAM H. MORGENS, AND CONTINENTAL
COMPANY, A CORPORATION,
PETITIONERS,

VS.

EDWARD L. SCHEUFLER, SUPERINTENDENT OF THE
INSURANCE DEPARTMENT OF THE STATE OF MIS-
SOURI, GUSTAVE J. CRECELIUS, ANNA M. CRECE-
LIUS AND MYRTLE K. CRECELIUS AND KANSAS CITY
LIFE INSURANCE COMPANY, A CORPORATION,
RESPONDENTS.

**RESPONDENT SCHEUFLER'S BRIEF OPPOSING
ISSUING OF A WRIT OF CERTIORARI.**

To the Honorable Chief Justice of the United States and
Associate Justices of the Supreme Court of the United
States:

STATEMENT.

Respondent, Edward L. Scheufler, Superintendent of
the Insurance Department of the State of Missouri, sets

forth herewith his statement of the controversy and the holding of the Supreme Court of Missouri:

On January 3, 1934, the Superintendent of the Insurance Department of the State of Missouri instituted a suit against Continental Life Insurance Company under the provisions of Article 10 of Chapter 37 of the Revised Statutes of Missouri, 1929. The amended petition upon which the case was tried alleged in substance that the capital stock fund of Continental Life Insurance Company was impaired; that the policy reserves were impaired; that its liabilities exceeded its available assets; that it was insolvent; and that its further continuance in business would be hazardous to its policyholders and to the public. After a protracted trial, a decree was entered on May 25, 1934, sustaining the allegations of the Superintendent's amended petition and adjudging that the company was insolvent; that its liabilities exceeded its available assets and that it was in such condition its further continuance in business would be hazardous to the public and those holding its policies. A more comprehensive statement of the facts involved on this original trial will be found in the opinion of the Missouri Supreme Court in *O'Malley, etc., v. Continental Life Insurance Company*, 343 Mo. 382, 121 S. W. 2d 834. This decree adjudged that title to all assets of Continental Life Insurance Company was thereby vested absolutely in the Superintendent of Insurance, and his successor or successors in office, for the use and benefit of the creditors and policyholders of such company and such other persons as might be interested therein. This decree constituted a final judgment within the meaning of Section 5945 of the Revised Statutes of Missouri, 1929. An appeal therefrom was taken by Continental Life Insurance Company to the Supreme Court of Missouri, but this appeal was not perfected and was dismissed by the Supreme Court in January of 1935.

On May 31, 1934, on motion of the Superintendent of Insurance under the provisions of Section 5950 of the Revised Statutes of Missouri, 1929, as amended, the Circuit Court entered an Order of Rehabilitation which directed the Superintendent to continue the business of Continental Life Insurance Company, and to manage and operate the same, subject to further orders of the Court. This Order of Rehabilitation provided that all policies of insurance, which had theretofore been in force on the books of Continental Life Insurance Company, should be continued in force and effect during the period of rehabilitation, subject, however, to the terms, conditions and limitations set forth in the Order. The original Order of Rehabilitation was amended on two subsequent occasions but it remained in force and effect, substantially as originally entered, until July 25, 1936.

In January, 1936, the Superintendent of Insurance submitted to the Court his application for instructions and directions as to whether he should negotiate for proposals looking toward the reinsurance of the business of Continental Life Insurance Company. The Court instructed the Superintendent to publicize the fact that proposals for reinsurance of this business could be made to him and directed the Superintendent to receive any such proposals which might be presented not later than April 15, 1936. Eight sealed proposals for reinsurance of Continental Life Insurance Company were submitted to the Superintendent, were opened in the presence of the Court and were filed with the Court. After these proposals had been filed in Court, the Superintendent filed his application seeking the instructions and directions of the Court relative to the acceptance and approval of any of the proposals submitted.

In the meantime the Superintendent had already filed his motion to terminate the procedure in Rehabili-

tation on the ground that the company had continued to be insolvent and that a continuance of the procedure in Rehabilitation would be futile and not to the best interests of policyholders. Continental Life Insurance Company and Ed Mays, its chief stockholder, had filed respective motions to terminate the order of Rehabilitation on the ground that the company was no longer insolvent but that its business, assets and affairs should be returned to the corporation.

During the time that the Superintendent was in charge of the business, assets and affairs of this company, under the supervision of the Circuit Court, he had prepared and filed two statements showing in detail the financial condition of the company. The first of these statements was prepared on December 31, 1934, and it showed that, as of that date, the liabilities of the company, exclusive of a liability for capital stock, exceeded its assets by the amount of \$2,135,540.64. Included in the liabilities shown by this financial report was an item of \$200,000 to cover the estimated expense of trial and rehabilitation. The second financial statement filed by the Superintendent was prepared as of December 31, 1935. This statement showed that as of this date the liabilities of the company, exclusive of a liability for capital stock, exceeded its assets by the amount of \$2,004,451.87. Included in the liabilities shown by this report was an item of \$225,000 to cover the estimated expense of trial and rehabilitation. In other words, as of December 31, 1934, not only had the capital stock fund of the company been wiped out, but the assets which should have been available for policyholders and creditors were impaired to the extent of \$2,135,540.64; and as of December 31, 1935, the capital stock fund of the company had been wiped out and the assets which should have been available for

policyholders and creditors were impaired to the extent of \$2,004,451.87.

In the summer of 1936 there was a trial upon the issues made by the respective motions of the Superintendent, Continental Life Insurance Company and Ed Mays, its chief stockholder, to terminate rehabilitation. During the hearings on these motions evidence was introduced as to the then financial condition of the company. Among other evidence, there was submitted to the Court the two financial statements above referred to. This evidence showed, without contradiction, that the company was grossly and hopelessly insolvent.

During the summer of 1936 the Court also conducted hearings upon the Superintendent's application for instructions relative to the disposition to be made of the eight proposals for reinsurance which had been filed in the Court, and evidence was received analyzing and explaining these proposals. The trial upon the various motions to terminate rehabilitation, and upon the Superintendent's application for instruction relative to the sale and reinsurance of the business and assets of the company, was concluded and submitted to the Court on July 22, 1936, and was taken under advisement by the Court until July 25, 1936, when the Court entered certain decrees disposing of all of the issues presented by the various motions to terminate rehabilitation and the Superintendent's application for instructions relative to the sale and reinsurance of the company. These orders or decrees, all of which were entered on July 25, 1936, are set out in full, beginning on page 47 of the Abstract of the Record. They may be summarized as follows, in the order of their actual entry upon the records of the Court:

1. An order or decree which disposed of the respective motions to terminate rehabilitation, by denying

the motions of the company and Ed Mays and by sustaining the motion of the Superintendent, specifically finding in this connection that the company had continued to be insolvent from the date of the original decree of insolvency entered on May 25, 1934, and that it was then insolvent. It decreed a dissolution and annulment of the charter of the company and authorized the Superintendent to settle and wind up its affairs. It provided that the sum of \$225,000 in cash be set aside for the purpose of paying certain expenses in connection with the rehabilitation of Continental Life Insurance Company and the settlement of its affairs (R. 47).

2. A decree which approved the contract of reinsurance of Kansas City Life Insurance Company, embodying said contract in the decree, and which fixed a lien of fifty per cent upon the reserves of non-registered policyholders, in accordance with certain provisions of the reinsurance contract (R. 49).

3. An order or decree of the Court which dealt more specifically with the sum of \$225,000, referred to in the two preceding decrees, defining its purposes and the method by which it was to be administered and adjudging that the balance, if any, remaining in such fund, after the purposes for which it had been set aside had been accomplished, was to be paid over to Kansas City Life Insurance Company (R. 74).

After the entry of these orders and decrees on July 25, 1936, both the company and Ed Mays, its chief stockholder, filed motions for a new trial and in arrest of Judgment (R. 202-207). After the overruling of these motions a joint appeal was taken by these parties to the Supreme Court of Missouri (R. 220). The Superintendent filed his motion to dismiss this appeal on the ground that the appeal was improperly taken from orders of the

Circuit Court overruling the motions for new trial, and this motion was sustained by the Supreme Court on April 14, 1938, and the appeal was accordingly dismissed (R. 225). In the meantime the Supreme Court had under consideration an appeal of the Superintendent of Insurance from allowance of fees made to Theodore Rassieur, one of the attorneys representing the company in the original trial. This case was decided favorably to the Superintendent on September 17, 1938, in an opinion which reviews in some detail the facts which were before the Circuit Court on the original trial in connection with the insolvency of Continental Life Insurance Company and the mismanagement of its business and affairs by Ed Mays, its president and chief stockholder (*O'Malley v. Continental Life Insurance Company*, 121 S. W. 2d 834, 343 Mo. 382).

On September 13, 1940, the Superintendent of Insurance filed his final report and settlement concerning his administration of the fund, originally in the amount of \$225,000, withheld from Kansas City Life Insurance Company under the provisions of the decrees entered on July 25, 1936, for the purpose of paying expenses in connection with the settlement and winding up of the business and affairs of Continental Life Insurance Company (R. 76). A Notice of Publication as to the filing of such final report was approved by the Court, fixing October 18, 1940, as the date upon which the report was to be submitted to the Court for approval (R. 79). Proof of Publication and Notice was filed on October 18, 1940, and on that date the final report of the Superintendent was presented and submitted to the Court (R. 80). On this same day C. E. Mottaz et al., who styled themselves as stockholders of the the dissolved Continental Life Insurance Company, filed their application for leave to intervene in the cause (R. 80). On November 22, 1940, Gustave J. Crecelius et

al., former policyholders of Continental Life Insurance Company, whose policies had been assumed by Kansas City Life Insurance Company under the terms and provisions of the Contract of Reinsurance set forth and embodied in the decrees entered on July 25, 1936, filed their application for leave to intervene in the cause (R. 84).

On November 22, 1940, Kansas City Life Insurance Company, which had become a party in said cause by reason of the Contract of Reinsurance approved by the Circuit Court on July 25, 1936, and the decrees of the Court entered on that day vesting it with an absolute right to any balance remaining in said fund, originally in the amount of \$225,000 withheld from it for the purpose of paying the expense of settling and winding up the business and affairs of Continental Life Insurance Company, filed its motion, seeking an order of the Court to disburse to it the balance of said fund (R. 87), to be applied for the benefit of the Continental policyholders as provided in said contract.

On November 22 and November 23, 1940, the Court heard the respective applications of the policyholders and alleged stockholders for leave to intervene and the motion of Kansas City Life Insurance Company for the disbursement to it of the balance remaining in said fund. These matters were taken under submission by the Court until April 7, 1941, when the Court entered its orders denying the application of the policyholders and alleged stockholders for leave to intervene, and sustaining the motion of Kansas City Life Insurance Company for the disbursement to it of the balance remaining in such fund. On the same day the Court entered an order approving the final report of the Superintendent of Insurance (R. 90-93). Thereafter the policyholders and alleged stockholders filed their respective motions for a new trial, which

proved unavailing (R. 94-95), and these parties have prosecuted appeals from the judgments of the Court denying their applications for leave to intervene.

The Supreme Court of Missouri decided the case (175 S. W. 2d 836) and denied the appealing stockholders any relief. The Missouri court, in its opinion as written, reviewed the facts in the case as well as the history of the Continental failure, and the Missouri court carefully considered the Missouri statutes composing the Missouri Insurance Code and carefully applied the statutes or code to the facts in the case. In the course of its opinion the Court said (R. ³⁷⁴119):

"We shall endeavor to dispose of the litigation within a reasonable space, expressly reserving our opinion as to all issues not explicitly ruled herein. For instance: The stockholders and the policyholders, complain of the action of the Court in entertaining and sustaining the Kansas City Life's motion to distribute to it while denying their respective petitions to intervene, asserting they were entitled to be heard on the merits. *Notwithstanding the orders of the Court denied the stockholders' and the policyholders' petition to intervene, the parties and the Court proceeded as though the contest between the three claimants was pending on the merits. This was irregular; but in the circumstances, we think we too may consider the case on the merits without discussing all issues presented*" (Italics ours).

The opinion then sets forth the Missouri statutes applicable to the case, and holds that the Superintendent of Insurance followed the statutes, and further holds that the Continental Life Insurance Company was insolvent by more than \$2,000,000 and that the Missouri Supreme Court had so found it to be in such an insolvent condition. The opinion recites all steps taken by the Superintendent of

Insurance under the Code and under the directions of the Circuit Court of the City of St. Louis, all as provided by the Missouri Statutes, and the opinion holds that on July the 25th, 1936, the Circuit Court in St. Louis properly entered its orders: (1) terminating the previous order of rehabilitation; (2) approving the contract of reinsurance with the Kansas City Life; and (3) providing for the handling of the withheld fund of \$225,000, and directing any balance of said fund to be paid over by the Superintendent of Insurance to the Kansas City Life Insurance Company. The opinion recited that appeals were taken by the chief stockholder of the company from all of these orders of the Circuit Court, and that the appeals were dismissed. The opinion takes up petitioners' allegations and analyzes them, and considers every allegation that the petitioners have ever asserted. The opinion again applies the Missouri Statutes to the contentions of plaintiffs (petitioners) and confirms the holding of the Circuit Court, and denies plaintiffs relief. The Court holds that the insolvency of the Continental exceeded \$2,000,000, and that this insolvency occasioned the placing of a lien against the reserve value of a large part of the policies outstanding. The opinion further holds that these liens amounted to as much as \$1,500,000 as late as December 31, 1939, and that there was little hope of their extinguishment prior to December 31st, 1946. The opinion, after completely reviewing the case and upholding the statutes of Missouri as well as the acts of the Superintendent and judgments of the Circuit Court, all of which effectively disposed of plaintiffs' claims, went on and said this:

With such liens outstanding against the reserve value of the non-registered policies and contracts an award of this fund of approximately \$95,000 to the stockholders of the insolvent and dissolved Con-

tinental Life Insurance Company *would be inequitable and would do violence to the intent and spirit of the Insurance Code and the intent and spirit of the Judgments and Decrees of July 25th, 1936, terminating rehabilitation and approving the Contract of Reinsurance*" (Italics ours).

The opinion thereafter takes up the contention of the policyholders (who are not petitioners for this writ) and the opinion then continues to dispose of the case as far as the complaining policyholders are concerned. The further holding of the Court in this opinion applies only to the question of disposition of the fund between the policyholders and the Kansas City Life, and in particular to the application of the fund after its award to the Kansas City Life, and the latter part of the opinion has no bearing upon petitioners' rights since the Court had held that the petitioners were not entitled to the fund.

Inaccuracies in Petition for Writ.

In the petition filed by the petitioners asking this court to grant its writ of certiorari are many inaccuracies and misstatements of fact. In order that this court may have a better understanding of the facts, we here set out our criticism of the petition.

1. On page 3 of the petition there is a misstatement of fact when it alleges, "expressly excepted a fund of \$225,000 from assets of the dissolved Continental Life Insurance Company conveyed to said reinsuring company to be used to pay the costs of the liquidation proceedings" (R. 52, 53). The true facts are (R. 53) "the sum of \$225,000 in cash *withheld* by First Party for cost of trial in the aforesaid suit and rehabilitation of said Continental Life Insurance Company." All the assets were conveyed

to the reinsuring company as shown by section I of the contract (R. 53), and as adjudged by the Circuit Court of St. Louis in its decrees of July 25th, 1936 (R. 47, 74).

2. On page 3 of the petition the holding of the Missouri Supreme Court is misquoted when it is charged that the court disregarded the Missouri Insurance Code and denied petitioners' claim as inequitable. The truth is that the Missouri Supreme Court (R. 319) held:

"With such liens outstanding against the reserve value of non-registered policies and contracts, an award of this fund of approximately \$95,000 to the stockholders of the insolvent and dissolved Continental Life Insurance Company would be inequitable and would do violence to the intent and spirit of the Insurance Code and the intent and spirit of the judgments and decrees of July 25, 1936, terminating rehabilitation and approving the contract of reinsurance."

The opinion of the Missouri Supreme Court is bottomed on the Code and the decrees of the St. Louis Circuit Court. The word "inequitable" as used in that opinion means only "unreasonable," "unjust," "ridiculous" or some such meaning, and is not to be confused with "a doctrine of equity."

3. On page 4 of the petition it is claimed that the Missouri Insurance Code, or that part of it applicable to the winding up of an insolvent company, is an insolvency law. Such a claim has no support. The Code provides a proper, equitable and orderly method for the handling and winding up of the affairs of an insolvent insurance company in order that all parties will be protected as far as the assets will go. The Code is primarily for the protection of policyholders and creditors. The debtor or the insolvent cannot voluntarily take advantage of the Code.

On the other hand, insolvency laws or the Bankruptcy Act are primarily for the benefit of the debtor or the insolvent, and he can force insolvency laws or the Bankrupt Act upon his creditors (*International Shoe Co. v. Pinkus*, 278 U. S. 261, 73 L. Ed. 318; *In re Salmon & Salmon*, 143 Fed. 395; *In re Weedman Stave Co.*, 199 Fed. 948).

4. On page 5 of the petition it is charged that the Missouri Supreme Court disposed of the case on equitable grounds and in total disregard of the Insurance Code. Such is not the holding of the Missouri court (R. 319, 322). The opinion did hold that by directing Kansas City Life Insurance Company to apply the fund "to the discharge of the liens as if paid by individual policyholders under the reinsurance contract, the policyholders will not be deprived of all benefits and will receive that consideration they might have hopefully anticipated at the time the reinsurance contract was agreed upon if the future events had been foreseen, as it is unlikely that a reinsurer would assume obligations in excess of assets on hand and available to discharge said obligations. We think this is the most equitable disposition of the fund to be made under the instant record and within the scope of the record." So the case was not decided on equitable grounds at all, and did not deprive petitioners of the equal protection of the laws.

5. On page 5 of the petition is set out "BASIS FOR THE JURISDICTION OF THIS COURT." Under said heading it is claimed,

(a) That the Missouri Supreme Court denied petitioners their rights under the Insurance Code. A reading of the opinion clearly demonstrates that the Code was carefully followed and correctly interpreted and applied. When that is done, the United States Supreme Court has

no jurisdiction on certiorari (*Broad River Power Co. v. State of South Carolina*, 281 U. S. 537, 74 L. Ed. 1023; *Neblett v. Carpenter*, 305 U. S. 297, 83 L. Ed. 182).

(b) On page 6 of the petition it is claimed that a Federal constitutional question was timely raised. That is not true. When the Circuit Court in St. Louis denied petitioners the right to intervene, then and there was the time to raise the constitutional question if petitioners wanted that question preserved, but no mention of a constitutional or Federal question gets into the case until the Supreme Court has decided the case. So the question was not timely raised (*McMillen v. Ferrum Mining Co.*, 197 U. S. 343, 49 L. Ed. 784; *Susquehanna Boom Co. v. West Branch Boom Co.*, 110 U. S. 57, 28 L. Ed. 69).

6. On page 6 of the petition, under the heading "QUESTIONS PRESENTED," again the petitioners disagree with the holding of the Missouri Supreme Court and contend that such a disagreement confers jurisdiction on this court. How erroneous that contention is can be illustrated by the cases of this court holding that a state supreme court can decide a case any way it wants to, so long as Federal right or constitutional right is not violated. This court cannot substitute its opinions for that of a state supreme court in a case involving the interpretation of a state statute (*Hartford Life Ins. Co. v. Blincoe*, 255 U. S. 129, 65 L. Ed. 549; *Broad River Power Co. v. State of South Carolina*, 281 U. S. 537, 74 L. Ed. 1023; *Neblett v. Carpenter*, 305 U. S. 297, 83 L. Ed. 182; *First National Bank of Garnett v. Ayers*, 160 U. S. 660, 40 L. Ed. 573).

PETITIONERS' SPECIFICATIONS OF ERROR.

Beginning on page 10 of petitioners' brief, they charge the Supreme Court of Missouri with eight errors. Doubtless, petitioners have overlooked the many cases of this court which hold that a state supreme court may commit as many errors as it can and decide a case on the wrong theory, yet this court cannot review that case because of those errors or wrong theories, unless (1) a Federal law or Federal right has been violated, or (2) unless the Constitution has been infringed upon (Cases, *supra*).

PETITION SHOULD BE DISMISSED.

I.

Because the Opinion of the Missouri Supreme Court Is Based upon a Proper Interpretation and Application of the Insurance Code of Missouri.

Secs. 6052 *et seq.*, Mo. Rev. Stats. (Appendix).

State ex rel. v. Hall, 330 Mo. 1107, 52 S. W. 2d 174.

1. Sec. 6064, Mo. Rev. Stats., 1939 Petitioners' Appendix), contemplates that all the assets of an insolvent insurance company shall pass to the reinsuring company, and that the costs of the case shall be paid by the reinsuring company (Sec. 6065) under the supervision and control of the court in which the proceedings are pending.

(a) Section 6065 (Appendix) would not require the reinsuring company to pay the costs of the proceedings unless it was contemplated and intended that the reinsuring company would get all of the assets of the insolvent company.

2. The decrees of the Circuit Court of the City of St. Louis, entered July 25th, 1936, were final judgments upon the reinsurance contract and the disposition of any balance of the assets that had been withheld from the reinsuring company by the Superintendent.

Section 6052 (Appendix), the last two lines of which read: "together with such other decrees and orders in connection therewith as the Court may deem advisable";

34 C. J., Sec. 794, p. 502, Note 12B.

Shee v. Shee, 319 Mo. 542, 4 S. W. 2d 760, 1. c. 761.

Hopkins v. Cofoid, 103 Ill. App. 167.

Biedstein v. Feltz, 156 S. W. 2d 29, 1. c. 31 (Mo. App.).

II.

The United States Supreme Court Has No Jurisdiction.

1. There is no Federal question presented by the record in this case.

U. S. C. A., Title 28, Sec. 344 (b).

Rules of the Supreme Court, Rule 38, Section 5 (a).

Chicago, etc., R. Co. v. Maucher, 248 U. S. 359, 63 L. Ed. 294.

Adams v. Russell, 229 U. S. 353, 57 L. Ed. 1224.

Cox v. Texas, 202 U. S. 446, 50 L. Ed. 1099.

Honeyman v. Hanan, 300 U. S. 14, 81 L. Ed. 476.

2. The alleged constitutional or Federal question was not timely raised.

McMillen v. Ferrum Mining Co., 197 U. S. 343, 49 L. Ed. 784.

Susquehanna Boom Co. v. West Branch Boom Co., 110 U. S. 57, 28 L. Ed. 69.

Godchaux Co. v. Estopinal, 259 U. S. 179, 64 L. Ed. 213.

3. Certiorari will not lie, because the question for decision was wholly for the state court.

Richardson Machinery Co. v. Scott, 276 U. S. 128, 72 L. Ed. 497.

Lynch v. People of the State of New York, 293 U. S. 52, 79 L. Ed. 191 (Head Note 3).

Broad River Power Co. v. South Carolina, 281 U. S. 537, 74 L. Ed. 1023 (Head Note 2).

Neblett v. Carpenter, 305 U. S. 297, 83 L. Ed. 182.

III.

There Was No Denial of Due Process.

1. The petitioners were given a full hearing.
Missouri Supreme Court Opinion (R. 314).
2. The decree and judgment of the St. Louis Circuit Court, entered July 25th, 1936, awarding the balance of the fund to the Kansas City Life Insurance Company, was final.

Cases cited under I, 2, above.

IV.

The Missouri Supreme Court Decided the Case on Non-Federal Questions, and There Is Substantial Support for the Opinion.

Cases cited under II, 3, *supra*.

1. The question involved is purely a local question, and one for the state supreme court to decide.
Hartford Life Ins. Co. v. Blincoe, 255 U. S. 129, 65 L. Ed. 549.
First National Bank of Garnett v. Ayers, 160 U. S. 660, 40 L. Ed. 573.
Broad River Power Co. v. South Carolina, 281 U. S. 537, 74 L. Ed. 1023.

V.

The National Bankruptcy Act As Well As Insolvency Laws Are Not Involved.

1. Because insurance companies are excluded from their operation.
National Bankruptcy Act, Section 4B.

In re Supreme Lodge of Masons Annuity, 286
Fed. 180.

Valley v. Northern Fire & Marine Ins. Co., 254
U. S. 348, 65 L. Ed. 297.

SUMMARY OF ARGUMENT.

I.

The petition filed in this Court does not truthfully present the opinion of the Supreme Court of Missouri.

II.

The opinion of the Missouri Supreme Court is a correct interpretation and application of the Missouri Insurance Code, which is an exclusive method for liquidating the affairs of an insolvent insurance company.

III.

The title to any of the remaining funds left in the hands of the Superintendent belonged to the Kansas City Life Insurance Company from and after the Circuit Court decree of July 25th, 1936.

IV.

This Court is without jurisdiction to grant its writ of certiorari, since the Judicial Code does not provide for a review by this Court of the decision of a state supreme court unless there is a Federal question drawn into the case, or unless some provision of the Federal Constitution has been violated, and then only when such questions are properly and timely raised.

V.

The decision of a state supreme court in defining and interpreting a state statute, is decisive and binding upon this Court, and this Court is without authority to substitute its opinion or interpretation of a state statute for that of the state court.

VI.

Petitioners' constitutional rights have not been violated, neither have petitioners been deprived of their property, rights or immunities without due process of law.

ARGUMENT.

Petitioners, in their argument, cite numerous cases which, when read, are wholly void of any authority for the propositions asserted by petitioners. For instance, the case of *U. S. v. Bethlehem Steel Corporation*, 315 U. S. 289, merely holds that the Supreme Court cannot disregard an act of Congress in order to reach a conclusion that some judge or person might think to be more just than the results accomplished under the act of Congress.

Again, in the two cases of *In the Matter of the Commonwealth of Virginia*, 100 U. S. 313, and *Norris v. Alabama*, 294 U. S. 537, the holding is merely to the effect that a state cannot evade the equal protection clause of the Federal Constitution by deliberately refusing to call negroes into jury service.

Petitioners, in their discussion of insolvency laws, cite cases such as *International Shoe Co. v. Pinkus* and *In re Weedman Stave Co.*, which cases hold that a state cannot pass an insolvency law that infringes upon the National Bankruptcy Act, because only Congress can enact bankruptcy laws.

The case of *In re Salmon & Salmon*, cited by petitioners, is an authority to the effect that a state may pass valid laws pertaining to the liquidation of insolvent banks, and inferentially this case is an authority for the Missouri Insurance Code.

The case of *U. S. v. Butterworth Corporation*, 269 U. S. 504, cited by petitioners, instead of confirming any position taken by petitioners is an authority for the proposition that when an insolvent company turns over its

property and business to be administered by a receiver, it does this for the purpose of having its assets made available as a trust fund to pay its debts, and the court said:

"Here the fund being less than the debts, the creditors are entitled to have *all of it* distributed among them according to their rights and priorities" (*Italics ours*).

Nothing was left for the owners of the stock of the defunct corporation.

Petitioners, on page 20, under point VI, discuss the interpretation of local laws or state statutes by the state court, and each case cited by petitioners is an authority against their contention. For instance, in the case of *Broad River Power Co. v. South Carolina*, 281 U. S. 537, the Supreme Court denied certiorari, saying:

"But there is no evasion of the constitutional issue (cases cited), and the non-Federal ground of decision has fair support (cases cited). This court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court."

In the *Fox River Paper Co. case*, 274 U. S. 651, which case involved the right of a state court to decide questions pertaining to the maintenance of a dam on Fox River, the court said, in denying certiorari:

"There being no question of evasion of constitutional issue (cases cited), this court on writ of error must accept as final the rule of the state court of last resort on all matters of state law."

The court further said:

"We are not concerned with the correctness of the rule adopted by the state court, its conformity to authority, or its consistency with related legal doctrine. It is for the state court in cases such as this, to define rights in land located within the state, and the 14th Amendment, in the absence of an attempt to forestall our review of the Constitutional question, affords no protection to supposed rights of property which the state courts determine to be non-existent."

In the cited case of *Ward v. Love County*, 253 U. S. 17, the Supreme Court held that the Supreme Court of Oklahoma had violated a Federal exemption pertaining to the Indians, and held that the Oklahoma Court had evaded a Federal question by deciding the case on non-Federal grounds without substantial support for its decision, but, in passing on the case, the court said:

"It is true that a judgment of a state court, which is put on independent non-Federal grounds broad enough to sustain it cannot be reviewed by us."

In the cited case of *Enterprise Irrigation District*, 243 U. S. 157, the Supreme Court dismissed for want of jurisdiction an appeal from the Supreme Court of Nebraska, and, in determining its jurisdiction, the court said this:

"Thus we are concerned with a judgment placed upon two grounds, one involving a Federal question and the other not. In such situations our jurisdiction is tested by inquiring whether the non-Federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any Federal question, and we have no power to disturb it (cases cited). But where the non-Federal ground has fair support we are not at liberty to inquire whether it is right or wrong, but must accept it, as

we do other state decisions on non-Federal ground (Cases cited)."

Petitioners cite the case of *Lawrence v. State Tax Commission*, 286 U. S. 276. Certiorari was denied to the Supreme Court of Mississippi since the record did not contain facts concerning local conditions, but the Court held that:

"The Supreme Court of Mississippi found it unnecessary to pass upon the validity of so much of the statute added by the Amendment of 1928 as exempted domestic corporations from the tax on income derived from outside the state. It said that if the amendment were valid appellant could not complain; if invalid he would still be subject to the tax, since the old law would then remain in force."

This case is just another authority for the proposition that a state court may decide a question pertaining to its statutes, and the United States Supreme Court is bound by that decision unless a Federal question is circumvented by unsubstantial reasoning.

Petitioners, in their attempt to justify their failure to raise their constitutional question for the first time until they filed their motion for rehearing in the Supreme Court, rely on the case of *Great Northern Railroad Co. v. Sunburst*, 287 U. S. 358, which case involves a railroad tariff in Montana. However, in that case the court held that there was a virtual stipulation between counsel to the effect that the Supreme Court should consider the constitutional point even though it was not raised until the motion for rehearing was filed. Consequently, this case does not overrule the cases holding that it is too late to raise the question for the first time in the motion for rehearing (*Godchaux Co. v. Estopinal*, 251 U. S. 179, 64 L. Ed

213; *Mutual Life Ins. Co. v. McGrew*, 188 U. S. 291, 308, 47 L. Ed. 480, 484). The other case relied on by petitioners, *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, is a case involving a tax assessment in Missouri, but which case is not any authority for the overruling of the general proposition that the raising of a constitutional question for the first time in the motion for rehearing in the Supreme Court comes too late. In this case the Supreme Court of Missouri, by reversing one of its former cases, had deprived the plaintiffs of an opportunity to be heard in another forum, consequently, the injury or damage was not done to plaintiffs until the Supreme Court reversed its former decision, and, naturally, that is the first time that the constitutional question could be raised. This case is merely an exception to the general rule, and one that has been long recognized.

We shall now briefly present our argument in chief.

I.

As hereinbefore pointed out, the petitioners in their petition have included numerous inaccurate statements and erroneous conclusions pertaining to the opinion of the Supreme Court of Missouri sought to be reviewed. In the first place, the decrees and judgments of the St. Louis Circuit Court, on July the 25th, 1936 (R. 47, 49, 74), as well as the contract of reinsurance (R. 52 (Sec. I)) do not recite that the sum of \$225,000 was excepted from the assets of the insolvent company, as stated by petitioners, but, on the other hand, these judgments, decrees and the contract itself expressly recite that this sum in cash was being *withheld* by the Superintendent of Insurance, and that it was to be subject to the further orders of the Court and was for the purpose of paying the expenses and counsel fees in connection with the settlement of the affairs

of the Continental and in the disposition and distribution of the assets of said insolvent company. To say that this sum was excepted from the assets is an erroneous statement of fact. It was merely withheld temporarily by the Superintendent, and he was to pay whatever legitimate expenses and fees were incurred and as approved by the Court, and any balance remaining was to be paid over to the Kansas City Life Insurance Company.

Petitioners also attempt to impress this court with the doctrine that the opinion of the Missouri Court wholly disregarded the Missouri Insurance Code and decided the case according to principles of equity. A reading of the opinion certainly refutes such a deduction. The last sentence in that portion of the opinion set out in the middle paragraph on page 319 of the Record certainly shows that the Missouri Court was relying upon the Insurance Code and the judgments and decrees of July 25th, 1936, when it denied the petitioners' claim to the fund in controversy. Certainly it would have been inequitable, unjust, unreasonable and ridiculous for the Missouri Court to award this fund to these stockholders, who had not only dissipated their small investment in the company, but had dissipated more than \$2,000,000 belonging to the policyholders of the company. The opinion speaks for itself, and a reading of it will convince anyone that the case was decided strictly in accordance with the Missouri Insurance Code.

II.

The Missouri Insurance Code has been judicially determined to be constitutional in every respect (*State ex rel v. Hall*, 330 Mo. 1107, 52 S. W. 2d 174). The provisions of the Missouri Insurance Code pertaining to the rights and prerogatives of the Superintendent of Insurance were

before this court in the early case of *Relfe v. Rundle*, 103 U. S. 222, 26 L. Ed. 337, and from that early case down to the present time all courts that have had occasion to write upon the Missouri Insurance Code have recognized it as constitutional, fair, equitable and just. When the Missouri Supreme Court in the present case reviewed that portion of the Code pertaining to the liquidation of insolvent companies, it found no provision in the Code for awarding any of the assets of the insolvent company to the former stockholders so long as liens remained on the policies. The opinion (R. 318) specifically considered the amendments to the Code in 1934, and the opinion fully sets out the contentions made by petitioners. Then the opinion proceeds to declare what the policy of the state of Missouri is, relative to sums realized from the assets of a dissolved insurance company, and this opinion declares that the policy of the state of Missouri, as set forth in the Missouri Insurance Code, requires that all of the assets of an insolvent and dissolved insurance company must go for the payment of expenses, taxes, death claims, policyholder claims, and that all of these claims must be paid *in full*, and then if any balance is remaining, it shall be disposed of *as the court may direct*. Certainly the Supreme Court of Missouri was within its limitations when it deliberately interpreted the statutes of Missouri and declared what these statutes meant and what the policy of the state is. This court has never denied that right to a state supreme court.

Richardson Machinery Co. v. Scott, 276 U. S. 128, 72 L. Ed. 497.

Lynch v. People of the State of New York, 293 U. S. 52, 79 L. Ed. 191 (Head Note 3).

Broad River Power Co. v. South Carolina, 281 U. S. 537, 74 L. Ed. 1023 (Head Note 2).

Neblett v. Carpenter, 305 U. S. 297, 83 L. Ed. 182.

Hartford Life Ins. Co. v. Blincoe, 255 U. S. 129, 65 L. Ed. 549.

First National Bank of Garnett v. Ayers, 160 U. S. 660, 40 L. Ed. 573.

This court will not inquire whether the rule applied by the state court is right or wrong, neither will it substitute its own view for that of the state court. As was said by this court in the case of *Fox River Paper Co. v. Railroad Commission*, 274 U. S. 651, 71 L. Ed. 1279, at page 1283:

"This court on writ of error must accept as final the ruling of the state court of last resort on all matters of state law."

The correctness of this proposition has never been questioned by this court.

III.

The pertinent sections of the Missouri Insurance Code are set out in the appendix of this brief and in the appendix of petitioners' brief. By reference to Section 6052, which section governs the Superintendent in his proceedings to wind up insolvent companies, it will be noted from the last part of said section that, after the judgment dissolving the corporation or perpetually enjoining it from doing business has been entered, the court, upon motion of the Superintendent, may order the liquidation, settlement and winding up of the affairs of such company or for the rehabilitation of such company as provided in this chapter, and *that the court may make such other decrees and orders in connection therewith as the court shall deem advisable*. In other words, the circuit court having jurisdiction of the proceedings has com-

plete power to make any order in connection with the winding up of the affairs of the company that the court may deem advisable. Consequently, on July the 25th, 1936, the Circuit Court of the City of St. Louis had before it all matters pertaining to the liquidation of the Company, and, therefore, it was incumbent upon the Circuit Court at that time to make full and complete orders pertaining to the entire subject-matter, and to fully and completely dispose of the assets of the insolvent company. This the court did, and three orders, as shown by the Record (R. 47, 49, 74), completely disposed of all of the assets of the insolvent company and properly provided that any balance of the cost and expense money that was withheld by the Superintendent should be handed over to the Kansas City Life Insurance Company for the benefit of the Continental policyholders, after the closing of the proceedings. These judgments of the Circuit Court on that date were final judgments, they were appealed from, and were never set aside. Consequently, the title to any remaining funds left in the hands of the Superintendent was by the judgments of the Circuit Court on that date vested in the Kansas City Life Insurance Company for the benefit of said policyholders; and thereafter the expenditure of any amount from these funds must be approved by the Circuit Court, and in the end the Superintendent should file an accounting in order that the Court might determine the net balance to be transferred by the Superintendent to the reinsuring company for the policyholders' benefit. These judgments forever divest the petitioners herein of any right or title to the fund in controversy.

Section 6064, which is the section of the Missouri statute providing for reinsurance of dissolved companies, requires the Superintendent of Insurance, subject to the approval of the Circuit Court, to reinsure the outstanding

business of the insolvent company on the best terms obtainable for all persons interested. This section, as well as the entire Insurance Code, requires the Superintendent to handle the assets of the insolvent company in such a manner as to give the policyholders the fullest protection possible. All through the Code the policyholders are to be given first consideration, next the creditors get consideration, and, lastly, other parties interested. Consequently, the reinsurance section of the statute must require that the Superintendent turn over all of the assets to the reinsuring company "in order to get the best terms obtainable" for the policyholders. Certainly a permanent retention of part of the assets or an allotment of part of the assets to the old stockholders would prevent the making of a reinsurance contract for the best interests of the policyholders. In this case a lien was imposed upon all non-registered policies of the Continental. Therefore, to contend that a portion of the assets was withheld for the benefit of the old stockholders under a reinsurance contract that imposed upon the policyholders a lien on their policy reserves would only result in the making of a reinsurance contract to the detriment of the policyholders, and not on "the best terms obtainable" as required by the statute.

IV.

The jurisdiction of this court to grant its writ of certiorari to a state supreme court is fixed by the Judicial Code, Section 237, amended (U. S. C. A., Title 28, Sec. 344 (b)). The only ground authorized by the Judicial Code for such review is that there has been drawn into the case a Federal question.

Again, Rule 38 of the Supreme Court Rules, and particularly Section 5 of that rule, provides that your

writ is issued only on sound judicial discretion, and will be granted only where there are special and important reasons therefor, and pertaining to a review of a decision of a state court your rule provides, Section 5 (a):

“Where a state court has decided a Federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.”

Your rule further states, in said Section 5, that the above quoted portion is neither controlling nor fully measuring your discretion, but that it does indicate the character of reasons which will be considered by you. We contend that there is nothing in the petition before you that fulfills or complies with either the requirements of the Judicial Code or your own rule. There is a total absence of a Federal question in this case. No Federal statute or treaty touches this case. This court will not undertake to review the decision of a state court unless it appears affirmatively from the record not only that the Federal question involved was presented for decision to the highest court having jurisdiction, but that its decision of the Federal question was necessary to a determination of the cause (*Honeyman v. Hanan*, 300 U. S. 14, 81 L. Ed. 476).

It has been held that the power of the U. S. Supreme Court to review decisions of state courts is limited to decisions on Federal questions (*Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 74 L. Ed. 1107).

It has been consistently held by this court that bare averment of a Federal question is not sufficient. There must be a real, and not a fictitious, Federal question involved. A reading of the opinion under consideration fails to disclose the presence of a Federal question of any kind or nature.

Moreover, if there were a Federal question or constitutional question involved, the petitioners failed to raise such a question at the proper time. Petitioners do not claim that they ever mentioned a violation of their constitutional rights until they filed their motion for rehearing in the Supreme Court, which was after the Supreme Court had written the opinion before you. It has long been the law in this court that when the question is raised for the first time in a motion for rehearing, this court will not take jurisdiction. In the case of *McMillen v. Ferrum Mining Co.*, 197 U. S. 343, 49 L. Ed. 784, it is said:

"It is sufficient for the purpose of this case to say that no Federal question appears to have been raised until the petition was filed for a rehearing. This was obviously too late, unless, at least, the court grants the rehearing and then proceeds to consider the question."

The general rule of this court is again laid down in the case of *Godchaux Co. v. Estopinal*, 251 U. S. 179, 64 L. Ed. 213, where it is said:

"The settled rule is that, in order to give us jurisdiction to review the judgment of a state court upon writ of error, the essential Federal question must have been especially set up there at the proper time and in the proper manner; and, further, that if first presented in a petition for rehearing, it comes too late unless the court actually entertains the petition and passes upon the point."

This is the holding of the Court, and there are many cases on that point. The only exception to the rule is, as is noted in the above quotation, and that is, where the state court in considering the motion for rehearing, and in which motion the Federal question has been raised

for the first time, takes the question and decides it. Then, of course, the state court has brought the Federal question into its opinion and decision, and, naturally, this court could review the case. It is plain that in the record under consideration the court did not consider the question on the motion for rehearing, and, consequently, there is no Federal question in the case and nothing before this court to permit the taking of jurisdiction by this court on that ground. The motion for rehearing was denied without written opinion. As a matter of fact, petitioners lost their right to contend that there was a deprivation of their constitutional rights and immunities when they failed to include such an allegation in their motion for new trial in the Circuit Court of St. Louis. Certainly, if they were going to contend that their constitutional rights were being infringed upon, it was the denial of their petition to intervene in the Circuit Court that gave rise to any such pretended violation of their Federal rights. The two cases cited by petitioners in support of their tardiness in raising the question have been analyzed and explained above. They are cases within the exception of the general rule, but in no way violate the general rule.

Petitioners claim that their property has been taken without due process of law, and that their rights have been violated, contrary to the provisions of the Federal Constitution. To maintain such a position petitioners say that the Supreme Court has improperly interpreted a local law or statute, and that by its interpretation and application of the local law the Supreme Court of Missouri deprived them of the fund in controversy.

The question that was decided by the Missouri Court was wholly and purely one for a state court to decide, and the opinion of the state court on the Missouri statutes is consistent with previous holdings of the Missouri Su-

preme Court on the Missouri Insurance Code (*State ex rel. v. Hall*, 330 Mo. 1107, 52 S. W. 2d 174). Petitioners do not like what the Supreme Court decided, but whether the opinion be right or wrong, this court is without authority to review the decision. This court has frequently said that even though the state court reaches a wrong decision on a local matter, yet this court cannot substitute its opinion therefor. So, even if the opinion in this case were entirely wrong, yet it is upon a question that the Missouri Supreme Court alone can finally pass, and petitioners are bound thereby. The construction and meaning attributed by the Supreme Court of the state to a statute of the state must be accepted by the United States Supreme Court just the same as though its meaning or construction had been specifically expressed in the statute (*Supreme Lodge, etc., v. Meyer*, 265 U. S. 30, 68 L. Ed. 385). A state court can render an erroneous decision on a question of state law, or it may overrule principles established by previous decisions on which everybody had relied, yet that does not confer appellate jurisdiction on the United States Supreme Court.

In *Neblett v. Carpenter*, 305 U. S. 297, 83 L. Ed. 183 (Head Note 2), this court, in denying a writ of certiorari to the Supreme Court in a case involving the California Insurance Code, said:

"It is argued that the authority which the Code confers on the (Insurance) Commissioner to enter into rehabilitation or reinsurance agreements does embrace a contract for assumption of the insolvent company's policies by a new company organized by the Commissioner. The court below held the provisions of the statute contemplate such action. It is claimed that the Commissioner's action violated certain state statutes concerning fraudulent conveyances. The

state court held the contrary. All of these holdings concern matters of state law and amount at most to alleged erroneous constructions of the state's statutes by its own court of last resort. Such decisions would not be a denial of the due process guaranteed by the 14th Amendment. We are, therefore, without jurisdiction to review the state court's decision on any of those questions. It is argued that the Code unconstitutionally delegates legislative functions to the Commissioner, and that the Supreme Court erred in not so holding. This, again, is a question of state law, the decision of which by the state's highest court is binding on us."

Certainly this late expression from this court, which case involved the Insurance Code of California, should convince anyone that the Missouri opinion in the instant case is final, and that the United States Supreme Court is without authority to review it.

Conclusion.

We respectfully submit that, (1) petitioners failed to raise their alleged constitutional question at the proper time or in the proper court; (2) that the action of the Supreme Court of Missouri in construing, interpreting and applying the Missouri Insurance Code, did not deny petitioners equal protection of the laws as guaranteed by the Fourteenth Amendment of the Federal Constitution.

We further submit that this court is without jurisdiction, and that its writ should not go because (1) there is no Federal question passed upon or involved in the Missouri Supreme Court decision, and (2) the questions and matters decided by the Missouri Supreme Court were questions upon which only the Supreme Court of the state

could pass, and that its holding is final and controlling upon the Supreme Court of the United States.

Respectfully submitted,

PRESTON ESTEP,

Attorney for Respondent, Edward L. Scheufler, Superintendent of Insurance.

STANLEY BASSETT,
JOS. R. STEWART,
Kansas City, Missouri,
Of Counsel.

[unclear]